APPEAL NO. 010694

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 27, 2001. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not timely report his work-related injury to his employer; that he did not have good cause for his failure to do so; that the employer did not have actual knowledge of the _____, on-the-job injury; that the claimant did not make an election of remedies by accepting group health insurance benefits; that the respondent's (carrier) election of remedies defense was not based on newly discovered evidence; and that the claimant has not had disability because he did not sustain a compensable injury. In his appeal, the claimant asserts error in the hearing officer's notice, good cause, and actual knowledge determinations. In its response to the claimant's appeal, the carrier urges affirmance. The carrier did not appeal the determinations that the claimant did not make an election of remedies in this case or that it had waived the right to raise an election of remedies defense by not raising it within 60 days of the date it received written notice of the claimed injury.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant did not timely report his injury to his employer and that his good cause for his failure to do so did not continue up to the date he reported his injury on September 4, 2000. The hearing officer determined that the trivialization in this case ended on July 26, 2000, the date the claimant was referred to Dr. F, an orthopedic surgeon. By that date, six months had passed since the date of injury and the claimant acknowledged that the condition of his shoulder had deteriorated to the point that he was limited in what he could do with it. In addition, by July 26, 2000, the claimant had undergone an MRI of the right shoulder, which revealed a possible rotator cuff tear. Finally, it should be noted that while Dr. F was not convinced that the claimant had a tear at his initial evaluation, he considered the claimant's condition serious enough to prescribe anti-inflammatories and to recommend a course of therapy. Based on those circumstance, the hearing officer determined that a reasonably prudent person could no longer believe that his injury was not serious. The hearing officer was acting within her role as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in so finding. Similarly, we cannot agree that the hearing officer erred in determining that the employer did not have notice of the injury based upon Ms. V having told the claimant's supervisor about the claimant's fall and that the claimant might be injured. As the hearing officer noted, when the claimant was asked about it by his supervisor, he denied that he had been hurt. The claimant repeated that statement in his appeal. The hearing officer determined that under those facts, the employer did not have notice that an injury had occurred at work. Her determination in that regard is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on appeal. Pool v.

Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the determination that the carrier is relieved of liability for the claimant's injury pursuant to Section 409.002, we likewise affirm the determination that the claimant did not have disability. By definition, the existence of disability is dependent upon the existence of a compensable injury. Section 401.011(16).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent. We have held since early on that matters relating to notice to the employer and exceptions thereto should be broadly construed, even before the case of Albertson's Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999) made clear that liberal interpretation of the workers' compensation law is still viable in the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993. Notice need not be given instantaneously when the seriousness of an injury is appreciated and a reasonable reaction time may be allowed. Texas Workers' Compensation Commission Appeal No. 000282, decided March 14, 2000.

While I would have held differently on the initial timely notice, the claimant does agree that he did not precisely state that he was injured. However, this case represents textbook good cause for untimely notice. The hearing officer plainly erred in cutting off "good cause" based solely on the referral to the orthopedic surgeon. She ignored the substance of what that surgeon then said--that the claimant did not have a rotator cuff tear and appeared to have tendinitis, muscle inflammation which may legitimately be regarded as trivial. I am unwilling to adopt a standard whereby a layperson should be required to know better than the medical opinions of his treating physicians. The Rockies don't crumble, Gibralter doesn't tumble if a carrier, having accepted premium for work-related injuries, is required to cover one whose severity was initially, and

legitimately, in doubt, and where the employer was also notified on the spot of the injurious, witnessed incident and had the opportunity to investigate the facts of the occurrence at that time.

Susan M. Kelley
Appeals Judge